

Memorandum 2004-19

Conforming Evidence Code to Federal Rules: Role of Judge and Jury

The Commission is currently studying differences between the California Evidence Code and the Federal Rules of Evidence. The purpose of the study is to determine whether California law should be revised to incorporate aspects of the Federal Rules. Professor Miguel Méndez of Stanford Law School has prepared the third installment of a background study on the subject. See Méndez, *California Evidence Code — III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003 (2003) (hereafter “Background Study”). The background study, which is attached, examines the role of the court and the jury in deciding questions on the admissibility of evidence. An exhibit, containing the statutes and rules most relevant to this memorandum, is also attached.

All statutory references in this memorandum are to the Evidence Code.

ROLE OF JUDGE AND JURY IN FINDING PRELIMINARY FACTS

In many cases, the admissibility of a piece of “proffered evidence” (see Section 401) will depend on the existence or nonexistence of a “preliminary fact” (see Section 400). For example, P is suing D on an alleged agreement. P negotiated the agreement with a third party, A. The proffered evidence of negotiations between P and A is irrelevant (and therefore inadmissible) unless P can prove the preliminary fact that A was D’s agent.

There are two different standards for the determination of a preliminary fact.

Sufficiency of Evidence (Determination by Jury)

Under Section 403, the judge must admit proffered evidence if there is sufficient evidence to sustain a finding of the necessary preliminary fact. The judge need not be persuaded that the preliminary fact exists; it is enough to find evidence sufficient for the jury to reach such a conclusion. If the evidence satisfies that initial hurdle, the proffered evidence is admitted and the jury decides. Federal Rule 104(b) provides a parallel rule.

In California, the sufficiency standard applies if the preliminary fact question involves the relevance of proffered evidence, the authenticity of a writing, the

personal knowledge of a lay witness, or whether a statement or conduct was correctly attributed to a person. The Assembly Judiciary Committee Comment to Section 403 explains the application of that section:

The preliminary fact questions ... to be determined under the Section 403 standard, are not finally decided by the judge because they have been traditionally regarded as jury questions. The questions involve the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues. It is the jury's function to determine the effect and value of the evidence addressed to it. ... Hence, the judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question. ... If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury.

Rule 104(b) has a similar scope of application. See Background Study at 1013-14.

Determination by Judge

In cases that are not governed by Section 403 (or Rule 104(b)), the judge decides whether the preliminary fact exists. See Section 405 and Rule 104(a). The Assembly Judiciary Committee Comment to Section 405 explains the application of that section: "Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion." Thus, a preliminary fact necessary for admission of hearsay, or of a confession in a criminal case, or to establish an evidentiary privilege will be decided by the judge, so as to shield the jury from potentially misleading, prejudicial, or privileged evidence until it can be determined whether there is grounds for its admission.

DIFFERENCES BETWEEN THE CALIFORNIA AND FEDERAL APPROACHES

There are a number of minor differences between the California and Federal approaches to the determination of a preliminary fact. Some of those differences result from the fact that California's law is generally more detailed than the Federal Rule. Professor Méndez approves of California's more detailed approach, which provides better guidance to judges and practitioners. See, e.g., Background Study at 1008, 1010-12, 1019.

Although the Background Study does not recommend any specific change to California law, it does identify a few areas in which the federal approach might be superior. Those issues are discussed below.

APPLICATION OF RULES OF EVIDENCE IN JUDICIAL DETERMINATION OF PRELIMINARY FACT

Under Federal Rule 104(a), when the judge decides a preliminary question, the judge “is not bound by the rules of evidence except those with respect to privileges.” In other words, evidence that would not ordinarily be admissible may be considered by the judge in determining a preliminary fact question.

Section 104 of the Uniform Rules of Evidence (1999) includes a substantively identical provision. That approach has been adopted in at least 18 states (Alabama, Arkansas, Hawaii, Indiana, Iowa, Louisiana, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Washington, and West Virginia).

California’s Evidence Code does not include an analogous provision. In 1964, a similar rule was proposed in a Law Revision Commission tentative recommendation. The tentative recommendation explained the proposed change as follows:

Many reliable (and, in fact, admissible) hearsay statements must be held inadmissible if the formal rules of evidence are made to apply to the preliminary hearing. For example, if Witness W hears X shout, “Help! I’m falling down the stairs!”, the statement is admissible only if the judge finds that X actually was falling down the stairs while the statement was being made. If the only evidence that he was falling down the stairs is the statement itself, or the statements of bystanders who no longer can be identified, the statement must be excluded. Although the statement is admissible as a substantive matter under the hearsay rule, it must be held inadmissible if the formal rules of evidence are rigidly applied during the judge’s preliminary inquiry.

The formal rules of evidence have been developed largely to prevent the presentation of weak and unreliable evidence to a jury of laymen, untrained in sifting evidence. ... The hearsay rule is designed to assure the right of a party to cross-examine the authors of statements being used against him. ... Where factual determinations are to be made solely by the judge, the right of cross-examination is not uniformly required; frequently, he is permitted to determine the facts entirely from hearsay in the form of affidavits and to base his ruling thereon. ...

There is no apparent reason for insisting on a more strict observation of the rules of evidence on questions to be decided by

the judge alone when such questions are raised during trial instead of before or after trial. In ruling on the admissibility of evidence, the judge should be permitted to rely on affidavits and other hearsay that he deems reliable. Accordingly, [the proposed provision] is recommended in order to provide assurance that all relevant and competent evidence will be presented to the trier of fact.

Tentative Recommendation and Study relating to *The Uniform Rules of Evidence, Article 1. General Provisions*, 6 Cal. L. Revision Comm'n Reports 1, 19-21 (1964) (citations omitted).

The provision exempting the judge from most exclusionary rules was removed from the Commission's recommendation just prior to its promulgation, in response to concerns raised by a State Bar committee formed to review the proposed law. In its letter to the Commission, the State Bar wrote:

Section 402(c) provides that, in determining the existence of a preliminary fact, exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege. This provision works a substantial change in existing California law. In actual litigation, the determination of a preliminary fact may be as important or more important than other phases of the trial. It is seldom that admissible evidence is excluded under existing practice. On the other hand, the proposed change in the law would permit the admission of highly prejudicial evidence even where the preliminary fact was shown solely by evidence which would be otherwise inadmissible. In the draft comment to this section ... the Commission hypothesizes the exclusion of a spontaneous declaration where the only evidence of spontaneity is the statement itself or the statements of bystanders who no longer can be identified. It is difficult to see how such a statement could be admitted even under the proposed change unless there existed circumstantial evidence of spontaneity, which in any event would be admissible. It is believed by the Committee that Section 402(c) would work far greater harm than would be justified by the magnitude of any problem it might cure.

Letter from State Bar Committee to Consider the Uniform Rules of Evidence to John H. DeMouly (November 3, 1964) (attached to Staff Memorandum 64-101, on file with the Commission).

The Commission apparently accepted the State Bar's argument that the proposed change might create problems. See Minutes of November 19-21, 1964, Commission Meeting, p. 6 (on file with Commission).

“Bootstrapping”

The State Bar objections stated above highlight a potentially controversial aspect of the federal approach. It allows the use of unreliable evidence to justify admission of other unreliable evidence. In the most extreme case, a court might rely solely on the proffered evidence itself to establish its own admissibility — a practice known as “bootstrapping.”

For example, Section 1240 permits admission of a hearsay statement if the hearsay is a spontaneous statement describing a present sense impression while the declarant is under the stress of excitement caused by the described event (“I’m falling down the stairs!”). Before hearsay can be admitted under that exception, the court would need to determine that the declarant was in fact experiencing the exciting event described while making the statement. Suppose, that the only evidence of the preliminary fact is the hearsay statement itself. If the court finds that the hearsay statement is proof of the fact necessary for admission of the hearsay, then the hearsay has lifted itself into admissibility by its own bootstraps.

That is not currently permitted under California law. Nor was it permitted under federal law prior to enactment of Federal Rule 104.

Bootstrapping Under Federal Law

Glasser v. United States (315 U.S. 60, S.Ct. 457 (1942)) is a seminal case disapproving the bootstrapping of hearsay. It involved an out-of-court statement made by an alleged co-conspirator. The prosecution sought to admit the hearsay under the doctrine that a statement made in furtherance of a conspiracy is admissible against co-conspirators. The court held that such declarations “are admissible over the objection of an alleged co-conspirator, who was not present when they were made, *only if there is proof aliunde that he is connected with the conspiracy.* ... Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.” *Id.* at 62 (emphasis added). See also Black’s Law Dictionary 48 (6th ed. 1991) (“aliunde” means “from another source; from elsewhere; from outside.”). In other words, there must be some evidence other than the hearsay statement itself.

After enactment of Rule 104, the Supreme Court abandoned the prohibition on bootstrapping, holding that a hearsay statement could be considered by a judge in determining whether a defendant is part of an alleged conspiracy — a

preliminary fact necessary for admission of the hearsay under the co-conspirator exception:

Rule 104(a) provides: “Preliminary questions concerning ... the admissibility of evidence shall be determined by the court. ... In making its determination it is not bound by the rules of evidence except those with respect to privileges.” ... The question thus presented is whether any aspect of *Glasser’s* bootstrapping rule remains viable after the enactment of the Federal Rules of Evidence.

...

The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. We think that the Rule is sufficiently clear that to the extent that it is inconsistent with petitioner’s interpretation of *Glasser* and *Nixon*, the Rule prevails. ...

Bourjaily v. United States, 483 U.S. 171, 177-79, 107 S.Ct. 2775 (1987).

Because there was other evidence of the defendant’s participation in the conspiracy in the *Bourjaily* case, the court did not need to decide whether a hearsay statement, standing alone, could be sufficient to bootstrap itself into admissibility. *Id.* at 181 (“It is sufficient for today to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted.”).

A subsequent rule amendment answered the question, at least as to co-conspirator hearsay (and other forms of authorized or adoptive admissions). Rule 801 was amended in 1997 to make clear that a hearsay statement is not, by itself, sufficient to establish the preliminary facts necessary for the statement to be admitted under the co-conspirator exception to the hearsay rule. In other words, it can be considered but it cannot be the relied on exclusively.

However, there are other situations in which bootstrapping could arise. For example, the Advisory Committee Note to Federal Rule 803 does not foreclose the possibility of bootstrapping in the context of the “excited utterance” hearsay exception:

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. ... Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as “increasing,” ... and as the “prevailing practice,”.... Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Thus, the Federal Rules do seem to allow bootstrapping in some contexts.

Note that the specific question of whether a court must follow the rules of evidence in considering the admissibility of co-conspirator hearsay wouldn't arise in California. This is because California law generally provides that the preliminary facts necessary for admission of admissions (including authorized and adopted admissions and co-conspirator statements) are subject to sufficiency review under Section 403. See Section 403 and Comment and Sections 1220-1223. Bootstrapping could occur with respect to other judge-determined preliminary facts.

Conclusion

Application of the rules of evidence to a judicial determination of a preliminary fact could result in exclusion of proffered evidence that is in fact reliable and relevant. For example, the hearsay declarant in the hypothetical stated earlier may actually have been falling down the stairs, despite the absence of any admissible evidence to prove that fact.

That problem is minimized under the federal approach, because it allows a judge to sift presumptively unreliable evidence for whatever grains of probative value it contains. The risk that the judge will assign greater weight to the evidence than it deserves is less than if the same evidence were offered to a jury for evaluation — judges are specially qualified to handle unreliable evidence.

In theory, the federal approach makes sense. In practice, the staff is not sure that such a significant change in the law is warranted. The current approach has been the law in California for over 100 years. A search of case law and secondary sources did not turn up any serious problems that have resulted. Forty years ago, the Commission considered exempting the court from most rules of evidence in determining preliminary facts, but decided against recommending such a change on the advice of practitioners.

The Commission's decision was based in part on State Bar concerns about "bootstrapping." That concern may have been overstated. The fact that a court may consider presumptively unreliable evidence does not mean that such evidence will be the only evidence considered by the court. Nor does it mean that the evidence will be considered conclusive, or even significant. A judge faced with the hearsay statement "I'm falling down the stairs!" may find that the statement alone does not meet the burden of proving the preliminary facts necessary for admission of the statement as an excited utterance.

The fact that existing law has not created any obvious problems and is based on a Commission recommendation argues in favor of preserving the status quo. On the other hand, there is a good theoretical rationale for the federal approach, and the practicality of the rule has been demonstrated in the federal courts and in the states that have adopted the equivalent Uniform Rule.

Considering that practitioners now have nearly thirty years of experience with the federal approach, it may be that the State Bar would reach a different conclusion if it were to consider the issue today. **The staff recommends that the Commission tentatively recommend conforming to federal law on this issue, so as to elicit comments from practitioners and judges on whether such a change would be appropriate.** If the Commission agrees, the staff will prepare draft language, along with a more fully developed discussion of whether bootstrapping should be permitted in different circumstances.

PRELIMINARY FACTS AND SECONDARY EVIDENCE

The Federal Rules still include a version of the Best Evidence Rule. See Federal Rule 1002 (“To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.”). As the Rule itself indicates, there are exceptions under which secondary evidence may be admitted. For example, the original is not required if it has been lost or destroyed (other than in bad faith). See Federal Rule 1004(1). To introduce secondary evidence under that exception, one would first need to prove that the original was in fact lost or destroyed. That preliminary fact, which is not a precondition for the *relevance* of the secondary evidence, should be determined by the court under Federal Rule 104(a).

However, Federal Rule 1008 provides a special rule for certain preliminary facts relating to the use of secondary evidence (emphasis added):

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. *However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.*

Why should the jury decide the matters described in italics above? The Advisory Committee Note to Rule 1008 explains:

[Questions] may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. ... The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), *supra*.

The Background Study, at pages 1024-25, suggests that similar problems could arise under California law and suggests that consideration be given to adopting the federal approach. That suggestion is discussed below.

Best Evidence Rule Repealed in California

Before discussing the specific issue raised in the Background Study, it should be noted that California repealed the Best Evidence Rule, on the Commission's recommendation, effective in 1999. See 1998 Cal. Stat. ch. 100; *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369 (1996).

Secondary evidence is now generally admissible to prove the content of a writing. Specific grounds for exclusion of secondary evidence are provided in Sections 1521-1522.

Original Never Existed

Under federal law, secondary evidence may be offered to prove the contents of an original writing if the original was lost or destroyed. Federal Rule 1004(1). A party might oppose introduction of the secondary evidence on the grounds that the original never existed, raising the problem discussed in the Advisory Committee Note to Federal Rule 1008.

The same issue could come up in California, but with a slightly different posture. Because the Best Evidence Rule no longer exists, secondary evidence can be used to prove the contents of the original unless an exception applies. Arguably, a party who opposes introduction of secondary evidence on the grounds that the asserted original never existed could object under the exception

provided in Section 1521(a). That section provides for the exclusion of secondary evidence on either of the following grounds:

- (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.
- (2) Admission of the secondary evidence would be unfair.

The preliminary facts described in Section 1521(a) do not fit any of the categories for application of the sufficiency standard under Section 403, and would therefore be determined by the court under Section 405. This could result in judicial determination of a preliminary fact that is also an ultimate issue in the case (i.e., whether the asserted document ever existed).

However, an objection that an original never existed should probably be framed as an issue of authentication. Section 1401(b) requires authentication of a writing before secondary evidence may be received to prove its contents. Authentication of a writing is subject to the sufficiency standard provided in Section 403. Therefore, if a dispute over the existence of the original is raised as an objection to authentication, the existence or nonexistence of the original would be decided by the jury under Section 403. The potential problem of judicial determination of an ultimate issue would be avoided.

It does not make sense to allow the same issue to be raised in two different contexts, with such different results. **The staff would resolve the issue by making clear that such a dispute should be resolved exclusively as a matter of authentication.** An objection that a purported copy is not actually a copy because there never was an original seems to be an objection to the copy's authenticity (i.e., it is not what it is claimed to be) rather than its accuracy (i.e., it is what it is claimed to be, but is imperfect). Section 1521 should be revised as follows:

1521. (a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:

(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. The question of whether the original writing ever existed shall be determined under subdivision (b) of Section 1401 and not under this section.

(2) Admission of the secondary evidence would be unfair.

(b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).

(c) Nothing in this section excuses compliance with Section 1401 (authentication).

(d) This section shall be known as the "Secondary Evidence Rule."

Comment. Section 1521 is amended to make clear that a dispute over whether a writing ever existed is to be treated as a question of authentication, rather than as an objection to the accuracy of secondary evidence. A preliminary fact relating to authentication of a writing is determined under Section 403.

This would employ the existing authentication procedure to avoid the problem described by the Advisory Committee — judicial determination of an ultimate factual issue in the case.

Accuracy of Material Terms

As discussed above, Federal Rule 1008 provides for sufficiency review of the question of whether an original writing ever existed. In addition, it provides for sufficiency review of whether proffered secondary evidence “correctly reflects the contents” of the original it is offered to prove. Under existing California law, an objection as to the material accuracy of secondary evidence is governed by Section 1521(a)(1), which provides for exclusion of secondary evidence if there is a genuine dispute concerning the material terms of the original writing and “justice requires the exclusion.” The preliminary fact of whether there is a dispute over material terms would be determined by the court under Section 405.

Court determination of whether there is a dispute as to the material accuracy of secondary evidence could preclude jury determination of an ultimate issue. For example, P offers a copy of a contract containing a term essential to P’s claim. D offers evidence showing that the copy offered by P is inaccurate as to the essential term (e.g. the word “not” was cropped off the end of one line when the document was copied). The judge, finding (1) that there is a genuine dispute and (2) that it would be unfair to admit the copy, excludes it. The jury never gets an opportunity to decide whether the term was as P asserted or not.

That problem only arises when there is no other evidence available to prove the disputed term. If the original or an undisputed copy are available, then that evidence could be admitted and the judge’s exclusion of the disputed copy would cause no harm.

If there is no other evidence available, should the judge decide the preliminary fact? The answer calls for a balancing of two legitimate concerns. On the one hand, judicial determination may interfere with the jury’s function of determining the credibility and probative value of evidence. On the other hand,

judicial determination protects the jury from exposure to evidence that is inherently misleading. “Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires the exclusion.” Section 405, Assembly Judiciary Committee Comment.

Historically, preliminary facts relating to the former Best Evidence Rule were decided by the judge under Section 405. *Id.* That suggests that secondary evidence matters were generally seen as involving unreliability of the type best addressed by the court rather than the jury.

More importantly, Section 1521 does not provide for exclusion of secondary evidence merely on a showing that there is a dispute as to material terms. In addition, the court must find that *justice requires the exclusion*. In other words, the inaccuracy of the secondary evidence must be of a type or degree that admission of the evidence would be unjust. For example, suppose that an original document uses color to convey material meaning. A black and white copy is offered to prove the content of the original. Under existing law, a judge might conclude that the material differences between the copy and the original render it inherently misleading, such that it would be unfair to submit it to the jury.

A mere dispute as to the accuracy of secondary evidence might well be the sort of preliminary fact appropriately decided by a jury. But material inaccuracy that would make admission of the evidence unjust seems to present exactly the sort of unreliability that Section 405 is designed to shield from the jury. “So far as the exclusionary rules of evidence are intended to prevent intellectual confusion or undue excitement of prejudice, they are much better enforced by keeping truly objectionable evidence entirely away from the jury, than by admitting such evidence conditionally with instructions as to its possible subsequent rejection.” Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv. L. Rev. 392, 394 (1927).

Because Section 1521(a)(1) is limited to cases where the material inaccuracy of secondary evidence is such that admission of the secondary evidence would work an injustice, **the staff believes that existing law is appropriate and should be preserved.**

JURY INSTRUCTIONS

Section 403(c)(1) provides that, on admitting proffered evidence under the sufficiency standard for determining a preliminary fact, the judge may (and on

request shall) “instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.”

Federal Rule 104 does not provide for such an instruction. The Background Study indicates that such an instruction can be requested and given under established federal court practice, but concludes that it would be better if the option were provided in the Rule itself. See Background Study at 1008. California law is superior to the Federal Rule in this regard.

However, the jury instruction provided pursuant to Section 403(c)(1) is silent on two important issues: (1) whether all jurors must agree on the existence or nonexistence of a preliminary fact, and (2) the standard the jury should apply in determining the existence or nonexistence of a preliminary fact.

The Background Study suggests that the question of jury unanimity would depend on the nature of the fact at issue — juror unanimity might be required if the preliminary fact is an element of a charged offense in a criminal case. See Background Study at 1026. Similarly, the burden of proof may depend on the nature of the fact at issue. A preliminary fact that is an element of an offense in a criminal case should be found beyond a reasonable doubt. That standard of proof may also apply to facts making up a circumstantial chain establishing an element of a charged offense. However, there is also authority suggesting that some facts used by jurors in a chain of reasoning leading to a guilty verdict may be proven by a preponderance of evidence. See Background Study at 1027, n. 138; *People v. Herrera*, 83 Cal. App. 4th 46, 63, 98 Cal. Rptr. 2d 911 (2000) (“In order for a declaration to be admissible under the coconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence.”).

Ultimately, the Background Study recommends retaining the jury instruction provision as it is currently drafted. *Id.* at 1027. **The staff agrees that the jury instruction provision should be retained.** However, it might also be helpful if Section 403 were revised to specify the burden of persuasion that applies when the jury finds a preliminary fact. If the Commission decides to pursue that issue, the staff will prepare a memorandum analyzing existing law and providing draft language for its codification.

HEARING CONDUCTED OUT OF PRESENCE OF JURY

Federal Rule 104(c) requires that a hearing on a preliminary fact be conducted out of the hearing of the jury if (1) the admissibility of a confession is at issue, (2) the accused in a criminal trial is a witness and so requests, or (3) the interests of justice require.

Under California law, the court generally has discretion to “hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury.” Section 402(b). However, if the preliminary question involves the admissibility of a confession or admission in a criminal case, the matter must be considered out of the presence and hearing of the jury if either party so requests. *Id.*

Despite the unambiguous language used in Section 402(b), some courts have said that a determination of a preliminary fact relating to an admission or confession in a criminal case should be held outside the presence of the jury, *regardless of whether a party so requests*. In *People v. Rowe* (22 Cal. App. 3d 1023, 1030 (1972)), the court stated:

While no request was made herein for an in camera session, it is a matter of common knowledge in the legal profession that in all instances where the defendant objects to the admission of a confession that the court, whether requested or not, should conduct the hearing outside the presence of the jury, the painfully obvious reason being that in the event the hearing is held in the jury’s presence and the court finds the confession to be involuntary, the court would undoubtedly be confronted with a motion for mistrial or a claim of prejudicial error on appeal. While there may be circumstances where a defendant would want his hearing in the presence of the jury, the best rule for the trial court to follow in general is that the hearing should be private.

See also *People v. Torrez*, 188 Cal. App. 3d 723 (1987) (court abused its discretion by holding extended hearing on adequacy of *Miranda* warnings in presence of jury).

However, in *People v. Fowler* (109 Cal. App. 3d 557 (1980)) the court disagreed with *Rowe*, upholding the court’s decision to consider admissibility in front of the jury, where neither party requested an in camera hearing.

If the Commission agrees with the position articulated in *Rowe*, it could resolve the existing split in authority by revising Section 402(b) as follows:

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury;

but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury ~~if any party so requests~~.

This would require that all objections to the admissibility of an admission or confession in a criminal case be decided out of the presence of the jury (as is required under Federal Rule 104(c)). Such a revision would eliminate the discontinuity between the letter of Section 402(b) and the contrary rule that has been applied in some appellate decisions.

The proposed revision would not impose much of an additional burden on the courts, especially if most such hearings are already being held in camera, as *Rowe's* invocation of "common knowledge within the legal profession" would suggest. Note that the California Evidence Benchbook advises that judges hold such hearings out of the presence of the jury, "even though no party so requests."

1 Jefferson, Cal. Evidence Benchbook § 23.2 (2d Ed. 1982):

The procedural rule for determining admissibility of a defendant's confession or admission out of the presence and hearing of the jury is a salutary one, as it prevents the jury from hearing evidence that may be extremely prejudicial to a defendant. If evidence of the defendant's admission or confession is excluded, still, the jury will have heard testimony regarding the circumstances under which defendant is alleged to have made a confession or admission. Herein lies the potential for prejudice if the hearing on admissibility is conducted in the presence and hearing of the jury.

The proposed change seems modest and beneficial. **The staff recommends that it be made.**

CONCLUSION

The memorandum discusses five main points of difference between California and federal law on the determination of preliminary facts:

- (1) Under federal law, when a court determines a preliminary fact, the court is not bound by the rules of evidence (other than the law governing privileges). The rationale for the federal approach is theoretically sound, and its practicality has been tested by nearly thirty years of application. **The staff is unsure whether there is a need to conform to the federal approach on this point, but believes it is worth exploring; a tentative recommendation should be issued to solicit public comment on the issue.**

- (2) Under federal law, when the introduction of secondary evidence is opposed on the grounds that the purported original never existed, that preliminary fact is decided by the jury. The same result would be achieved in California if the matter were framed as an objection to the authenticity of the original and the secondary evidence, rather than as an objection to the accuracy of the secondary evidence. **The staff recommends that California law be revised to make clear that the issue is to be decided as a matter of authentication.**
- (3) Under federal law, an objection to use of secondary evidence that is based on the inaccuracy of the evidence is decided under the sufficiency standard (i.e., by the jury after judicial screening). In California, secondary evidence is only excluded on the basis of its material inaccuracy if the court determines that justice requires exclusion. **The question of whether secondary evidence is so unreliable that its introduction would be unfair should be decided by the court, in order to prevent the injustice that would otherwise be realized if the question were submitted to the jury.**
- (4) California law is superior to federal law in that it expressly provides for a limiting instruction to the jury when a preliminary fact is determined by the jury. Federal law does not have an equivalent provision. California law could perhaps be further improved over federal law by the addition of language stating the standard of persuasion to be applied by the jury. **If the Commission decides to pursue this improvement, the staff will need to analyze existing law to determine the applicable standards.**
- (5) Unlike federal law, Section 402 does not require that determination of a preliminary fact necessary for admission of a confession or admission in a criminal case be conducted out of the presence of the jury. An in camera hearing is only required at the request of a party (though a court has discretion to decide the question out of the presence of the jury, sua sponte). Some courts have suggested that such a hearing should always be conducted outside the presence of the jury. Others have upheld the statutory rule. Given the risk of prejudice inherent in discussion of a disputed confession or admission in a criminal case, **the staff recommends resolving the split in authority by requiring that all such hearings be conducted out of the presence and hearing of the jury.**

Respectfully submitted,

Brian Hebert
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Exhibit

**EVIDENCE CODE PROVISIONS RELATING TO PRELIMINARY
DETERMINATIONS ON ADMISSIBILITY OF EVIDENCE**

Evid. Code § 400. “Preliminary fact” defined

400. As used in this article, “preliminary fact” means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase “the admissibility or inadmissibility of evidence” includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege.

Evid. Code § 401. “Proffered evidence” defined

401. As used in this article, “proffered evidence” means evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.

Evid. Code § 402. Determination of preliminary fact

402. (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

Evid. Code § 403. Preliminary fact admitted under sufficiency standard

403. (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;

(3) The preliminary fact is the authenticity of a writing; or
(4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

(c) If the court admits the proffered evidence under this section, the court:

(1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

Evid. Code § 404. Determination of whether proffered evidence is incriminatory

404. Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Evid. Code § 405. Judicial determination of preliminary fact

405. With respect to preliminary fact determinations not governed by Section 403 or 404:

(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

(b) If a preliminary fact is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

Evid. Code § 406. Evidence affecting weight or credibility

406. This article does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

FEDERAL RULE OF EVIDENCE 104

104. (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

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III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules

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California Evidence Code—Federal Rules of Evidence

III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules

By MIGUEL A. MÉNDEZ*

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I. Allocating Power Between Judge and Jury

THE CALIFORNIA EVIDENCE Code ("Code") and the Federal Rules of Evidence ("Rules") have much in common in defining the respective roles of judges and jurors. Their differences, while significant in some instances, are few in number.

The California provisions are gathered in Article 2 of Chapter 4 of the Evidence Code, which contains the rules on the admission and exclusion of evidence.¹ Article 2, entitled "Preliminary Determinations on Admissibility of Evidence,"² begins by defining as preliminary facts those facts upon whose existence or nonexistence depends the admissibility or inadmissibility of other evidence offered by the parties to prove their contentions.³

Questions regarding the admissibility of evidence are classified by the Code as questions of law to be decided by the judge.⁴ The Federal Rules of Evidence are in accord,⁵ and both the Code and Rules specify the procedure the judge is to follow in determining the existence or nonexistence of disputed preliminary facts.⁶

The Code expressly commits all "questions of fact" to the jurors, including questions regarding the credibility of witnesses and hearsay declarants.⁷ The Rules do not have an analogous provision. A specific rule, however, may be unnecessary since, under the common law, judges determined the admissibility of the evidence and jurors weighed the evidence that was admitted.⁸

Sections 403 and 405 are the principal Code provisions governing the proof of preliminary facts. In pertinent part they provide as follows:

Section 403. Determination of foundational and other preliminary facts where relevancy, personal knowledge, or authenticity is disputed

(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

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1. See CAL. EVID. CODE §§ 350-406 (West 1995).
 2. See *id.* §§ 400-406.
 3. *Id.* § 400 law revision commission's cmt.
 4. CAL. EVID. CODE § 310 (West 1995).
 5. FED. R. EVID. 104(a).
 6. FED. R. EVID. 104(c); CAL. EVID. CODE § 402 (West 1995).
 7. CAL. EVID. CODE § 312.
 8. MCCORMICK ON EVIDENCE § 53 (John William Strong ed., 4th ed. 1992).

- (1) The relevance of the proffered evidence depends on the existence of the preliminary fact;
 - (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;
 - (3) The preliminary fact is the authenticity of a writing; or
 - (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.
- (b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.
- (c) If the court admits the proffered evidence under this section, the court:
- (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.
 - (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

Section 405. Determination of foundational and other preliminary facts in other cases

With respect to preliminary fact determinations not governed by Section 403 or 404:

- (a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.
- (b) If a preliminary fact is also a fact in issue in the action:
- (1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.
 - (2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.⁹

The corresponding federal rule, Rule 104, in pertinent part provides as follows:

- (a) **Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

9. CAL. EVID. CODE §§ 403, 405 (West 1995). Section 404 governs the admissibility of Fifth Amendment privilege claims.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.¹⁰

Useful as that rule of thumb may be—that judges determine the admissibility of the evidence¹¹ while jurors find the “facts” from that evidence¹²—it does not answer all questions that might arise in the course of a trial. One reason is that judges often have to make factual determinations in ruling on the admissibility of evidence. Another reason is that judges play two distinct roles in making their admissibility rulings. One role calls for the judge to screen the proffered evidence on a sufficiency basis; the other by a higher standard, usually by a preponderance of the evidence.¹³ An example helps illustrate the differences in the two roles:

Assume that the accused is prosecuted for murder. The prosecution calls Witness A to testify that the accused told her that he killed the victim. The accused objects to the testimony on the ground that he made no such statement and offers to testify to that effect. The prosecution responds that the jury is entitled to hear Witness A’s testimony irrespective of the accused’s testimony and that, as a result, the accused must wait until his case-in-chief to offer his testimony. On what basis should the judge rule on the objection?

When the opponent claims that a declarant did not make a statement attributed to him, the objection is one of irrelevancy. In our example, if the accused was not the one who confessed to killing the victim, the declaration would be immaterial and therefore not probative of a proposition that is properly provable in the action.¹⁴ That objection is determined by the judge under the sufficiency standard in section 403. It provides that when the proffered evidence is the state-

10. FED. R. EVID. 104. With minor exceptions, the approach of the Uniform Rules of Evidence to preliminary fact determinations is taken from FED. R. EVID. 104. See also UNIF. R. EVID. 104.

11. Questions of law, including questions regarding the admissibility of evidence, are for the court. CAL. EVID. CODE § 310. Other questions of law include the construction of statutes, *Forio v. Lau*, 80 Cal. Rptr. 2d 409, 410 (Ct. App. 1998); of written contracts, *Heppler v. J. M. Peters Co.*, 87 Cal. Rptr. 2d 497, 507 (Ct. App. 1999); whether a plaintiff in a defamation action is a public figure, *Khawar v. Globe Intern., Inc.*, 965 P.2d 696, 702, cert. denied, 526 U.S. 1114 (1998); and whether a duty exists in a tort action, *Johnson v. United Servs. Auto. Ass’n*, 79 Cal. Rptr. 2d 234, 240 (Ct. App. 1998), disapproved on other grounds, *Leuter v. California*, 115 Cal. Rptr. 2d 68, 71 (Ct. App. 2002).

12. CAL. EVID. CODE § 312.

13. CAL. EVID. CODE § 115 assembly committee on judiciary cmt.

14. For an extended discussion of relevance, see Miguel A. Méndez, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES—PROBLEM APPROACH § 2.01 (2d ed. 1999).

ment of a particular person and the preliminary fact is whether that person made the statement, the judge should exclude the proffered evidence unless the proponent produces "evidence sufficient to sustain a finding of the existence of the preliminary fact" ¹⁵

The sufficiency standard of section 403 places strict limits on the role of the judge. The judge must let the jurors hear the declaration if the judge concludes that reasonable jurors could find that the accused made the statement. In making this assessment, the judge cannot pass on the credibility of the witnesses; that responsibility is assigned to the jury. The sole question for the judge is whether a reasonable jury could find the preliminary fact if the proponent's evidence is believed. Since Witness A is prepared to testify that he heard the accused confess to killing the victim, that evidence alone satisfies the sufficiency standard of section 403. Accordingly, the judge must overrule the accused's objection and deny his request to take the stand to testify that he did not make the statement. The accused must wait until his case-in-chief. If at that time the accused denies having told Witness A that he killed the victim and the judge finds the accused to be more credible than Witness A, the judge nonetheless must let Witness A's account stand. It is up to the jurors, not the judge, to determine whether to believe Witness A or the accused. Empowering the judge to withhold this kind of evidence from the jury based solely on the judge's assessment of who is telling the truth would deprive the prosecution of the right to have the jury determine an important factual question. ¹⁶

Section 403 provides the losing party some consolation. Upon request, the judge must instruct the jurors to disregard the proffered evidence unless they first find the preliminary fact. ¹⁷ In our example, they would be told to disregard the confession unless they first find that indeed the accused made the statement. But the Code and the Rules, as we shall see, are silent on the standard by which the jurors must find that the victim made the statement.

A federal judge would make the same rulings under Rule 104(b). The relevance of Witness A's testimony depends on whether the accused made the admission Witness A attributes to him. In the language of Rule 104(b), "the relevancy of [the] evidence depends upon

15. CAL. EVID. CODE § 403(a).

16. *Id.* § 403 assembly committee on judiciary cmt. ("If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury.").

17. *Id.* § 403(c)(1).

the fulfillment of a condition of fact," namely whether the accused made the admission.¹⁸ In determining whether to let the jurors hear Witness A's testimony, the federal judge is directed by the Rule to apply a sufficiency standard.¹⁹ The principal difference between the Code and the Rules in this respect is that the Code explicitly informs the judge and the litigants that the question whether the accused made the admission is to be governed by the standards set out in section 403. As will be shown, the Code expressly identifies the preliminary fact questions that are impliedly embraced by Rule 104(b). Providing the judge, the parties, and their lawyers with this kind of information is useful to trial planning and management. Section 403 is therefore superior to Rule 104(b) and should be retained.

Upon request, a federal judge would also give the jurors a limiting instruction telling them to disregard Witness A's testimony unless they first find that the accused made the admission. However, giving such an instruction upon request would be the product of established practice and not the result of a directive under the Federal Rules. The Rules do not contain a provision equivalent to section 403(c)(1) which requires the judge, upon request, to instruct the jurors to disregard the proffered evidence unless they find that the preliminary fact in issue exists.²⁰ This subdivision provides useful guidance to judges, litigants and their lawyers, and should be retained.

Assume that the prosecution calls a second witness, Officer B, to testify that the accused confessed to killing the victim. The accused objects to the introduction of the confession on the ground that the confession was coerced and requests permission to produce evidence to that effect. Must the judge grant the accused's request? The answer under both Federal and California law is yes. Constitutional considerations aside, the questions raised by the accused's objection are governed in California by Evidence Code section 405. This section "deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly"²¹ Section 405 proceeds on the assumption that it is unrealistic to expect a jury to disregard a confession which it finds to be involuntary, especially when parts of the confession are corroborated by other evidence.²²

18. FED. R. EVID. 104(b).

19. *Id.*

20. CAL. EVID. CODE § 403(c)(1).

21. *Id.*

22. CAL. EVID. CODE § 405 assembly committee on judiciary cmt. (West 1995). *See also* John Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CAL. L. REV. 987, 1008-1009 (1978) (arguing that only a judge's determination of whether a confession was

Accordingly, section 405 entitles the opponent to a hearing on the existence or nonexistence of the preliminary facts, which in this case center on the voluntariness of the confession.

Assume that at the hearing the accused testifies that Officer B promised him leniency in return for the confession and that Officer B denies having made any such promises. By what standard must the judge resolve the conflict in the evidence? Unless the rule of law applicable to the preliminary fact dispute states otherwise, the proponent must convince the judge by a preponderance of the evidence that the proffered evidence meets the required standards of trustworthiness²³—in our case that the accused confessed voluntarily. Under section 405, the judge sits as a jury of one. Like the jurors, the judge is entitled to consider both sides of the evidence, including the credibility of the witnesses. If at the conclusion of the section 405 hearing the judge believes Officer B, he will let the jury hear the confession. If he believes the accused, he will withhold the confession from the jury. If the judge cannot decide whom to believe, he will also withhold the confession, since the prosecution has the burden of persuasion.

Section 405 hearings differ from section 403 hearings in three important respects. First, unless the proponent stipulates to the opponent's evidence, the judge must allow the opponent to offer evidence of the nonexistence of the preliminary fact before ruling on the objection. Second, in ruling on whether the proponent has carried the burden of persuasion, the judge can consider the evidence produced by each side, as well as the credibility of the witnesses. Third, if the judge overrules the objection and admits the proffered evidence, the opponent is not entitled to an instruction telling the jurors to disregard the evidence unless they first find the preliminary fact²⁴—in the above example that the confession was voluntary. The opponent is not given a "second bite" at the apple, i.e., to have the jurors, as well as the judge, consider the admissibility of the evidence. That power is delegated exclusively to the judge by section 405. The jury, however, still retains the power to accept or reject the confession, since the jury ultimately decides what weight, if any, to give to witnesses' testimony.²⁵

taken in compliance with *Miranda* or was voluntary promotes the policies excluding illegal confessions).

23. CAL. EVID. CODE § 405 assembly committee on judiciary cmt. Unless the rule of law governing the preliminary fact determination under § 405 specifies a higher burden of persuasion, the applicable standard is proof by a preponderance of the evidence. *Id.* § 115.

24. *Id.* § 405(b)(2).

25. *Id.* §§ 312, 405 assembly committee on judiciary cmt., § 406.

In deciding the weight to give to the confession, the jurors may consider both the officer's and the accused's testimony.

A federal judge should behave exactly as a California judge in determining the admissibility of the confession. However, this would not be readily apparent to California practitioners reading Federal Rule 104(a) and its accompanying Advisory Committee Note. As will be explained, the Code has default provisions allocating and defining the production and persuasion burdens when those burdens are unascertainable under the "rule of law" governing the specific question arising under section 405. The Federal Rules do not. The United States Supreme Court has filled this gap by holding that the proponent of the evidence should be required to prove preliminary fact questions arising under Rule 104(a) by a preponderance of the evidence.²⁶ As will be explained, this holding is inconsistent with the role of the California judge when ruling on some aspects of hearsay declarations which in California are governed by section 403. In general, sections 403 and 405 represent a better thought out approach to preliminary fact questions and should be retained.

II. Preliminary Matters Governed by Section 403

Scholars disagree on when judges should use a sufficiency standard, as contemplated in section 403, or a higher standard, as is the case under section 405, in ruling on the admissibility of evidence.²⁷ The Code avoids the controversy by describing with particularity the kinds of preliminary fact issues governed by section 403 and relegating all other issues for determination under section 405.²⁸ Moreover, to eliminate uncertainties, various Code sections specifically state that admissibility depends on satisfying a sufficiency standard.²⁹ Finally, the comment to section 403 provides a useful commentary on the kinds of preliminary fact determinations that fall under the section.

Rule 104(b), on the other hand, does not specify the preliminary fact questions that fall within its ambit. Although the term "conditional relevancy" used in the advisory committee note probably em-

26. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). *See also* *Huddleston v. United States*, 485 U.S. 681, 684 (1988).

27. CAL. EVID. CODE § 403 assembly committee on judiciary cmt. *See generally* Kaplan, *supra* note 22 (examining the proper roles of judge and jury in making preliminary fact determinations).

28. *See* CAL. EVID. CODE §§ 403, 405. A separate section, section 404, governs the question of whether the judge should sustain a claim of privilege under the self-incrimination clause. *Id.* § 404.

29. *See, e.g., id.* §§ 1222, 1223, 1400.

braces the kinds of preliminary fact questions listed under section 403,³⁰ Rule 104(b) does not provide judges, litigants, or lawyers with the same kind of detailed guidance as does section 403 and its comment.

The preliminary fact issues listed in section 403 "are not finally decided by the judge because they have been traditionally regarded as jury questions. The questions involve the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues."³¹ To preserve the jury's right to determine factual issues,³² section 403 limits judges to applying a sufficiency standard in screening the admissibility of evidence subject to the section. Federal Rule 104(b) likewise achieves the same goal by requiring the judge to use a sufficiency test in screening the admissibility of evidence falling within the rule's ambit.³³

The preliminary facts subject to resolution under section 403 are as follows:

Relevance of the proffered evidence. Section 403 governs when the relevance of the proffered evidence depends on the existence of a preliminary fact.³⁴ As the Assembly Committee notes, "[I]f P sues D upon an alleged agreement, evidence of negotiations with A is inadmissible because irrelevant unless A is shown to be D's agent; but the evidence of the negotiations with A is admissible if there is evidence sufficient to sustain a finding of the agency."³⁵

Personal knowledge of a witness. Section 702 provides that the testimony of a lay witness concerning a particular matter is inadmissible unless the witness has personal knowledge of the matter.³⁶ Against objection, personal knowledge must be shown before the witness may testify about the matter.³⁷ Section 403 governs when the witnesses' personal knowledge is contested.³⁸

Section 800 permits lay witnesses to testify in the form of an opinion if it is rationally based on the perception of the witness and the

30. See *infra* text accompanying note 52. Professor John Kaplan questions whether Rule 104(b) embraces all of the situations enumerated by Code § 403. See Kaplan, *supra* note 22, at 995.

31. CAL. EVID. CODE § 403 assembly committee on judiciary cmt.

32. See *id.* § 312(a).

33. FED. R. EVID. 104(b).

34. CAL. EVID. CODE § 404(a)(1).

35. *Id.*

36. *Id.* § 702.

37. *Id.*

38. *Id.* § 403.

opinion is helpful to a clear understanding of the witness's testimony.³⁹ Whether or not the opinion is based on the witness's perception is governed by section 403, as the limitation "is merely a specific application of the personal knowledge requirement."⁴⁰

Authenticity of writings. When a writing is offered in evidence, the proponent must also offer evidence that the writing is what the proponent claims it to be.⁴¹ If in a contract dispute the plaintiff offers a writing which she claims is the contract she and the defendant entered into, then the plaintiff must offer some evidence indicating that the writing is indeed that contract. Whether or not the writing is the contract is governed by section 403.⁴² To eliminate any uncertainty about that point, section 1400, which defines authentication, imposes the same requirement.⁴³

Although authentication is usually associated with writings, the concept applies whenever any tangible object is offered in evidence.⁴⁴ Whether the object is the knife the prosecution believes the accused used to kill the victim or the ladder the plaintiff claims was defective, the proponent must connect the object with the case. Showing that the object is relevant to the issues to be decided will require some evidence that the object is what the proponent claims it to be. For purposes of admissibility, the quantum of evidence, as in the case of writings, need satisfy only section 403's sufficiency standard.

Identity of the actor or declarant. Section 403 governs when "[t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."⁴⁵ Impeaching a witness through a prior conviction assumes that the witness was the person who was convicted. If the identity of the person convicted is disputed, the judge must permit the use of the conviction if the proponent demonstrates by a sufficiency of the evidence that the person convicted was the witness.⁴⁶ The same principle applies when the preliminary issue is whether a particular person engaged in other conduct, including the making of statements.⁴⁷

39. *Id.* § 800.

40. *Id.* § 403 assembly committee on judiciary cmt.

41. *Id.* § 1400.

42. *Id.* § 403(a)(3).

43. *Id.* § 1400.

44. *Id.* § 1400 law revision commission's cmt.

45. *Id.* § 403(a)(4).

46. *Id.* § 403 assembly committee on judiciary cmt.

47. *Id.*

Earlier we saw that when the identity of a declarant is contested, the declaration may be received if the proponent establishes the identity of the declarant by a sufficiency of the evidence.⁴⁸ The same standard applies to the identity of hearsay declarants. Thus, any evidence that the statement was made by the claimed declarant is sufficient to warrant the introduction of admissions by parties under section 1220, of previous statements by witnesses under sections 1235–1236, as well as of the statements by the declarants who are described in sections 1224–1227 and whose liability, breach of duty, or right is at issue.⁴⁹

Whether a party has authorized or adopted an admission is also governed by section 403.⁵⁰ Since in California the admission of a co-conspirator is a form of an authorized admission, the admission is admissible upon the introduction of evidence sufficient to sustain a finding of the conspiracy.⁵¹

Section 403 and the doctrine of conditional relevance. A review of the kinds of preliminary facts governed by section 403 reveals that most involve some aspect of relevance. A writing or other tangible object is irrelevant unless it is what the proponent claims it to be; the statement of a declarant is irrelevant unless the declarant made the statement; similarly, a person's conduct is irrelevant unless it is the conduct of that person. In each instance the evidence is irrelevant unless some condition is fulfilled. For this reason, some scholars view these preliminary fact determinations as calling for a special relevance analysis known as "conditional relevancy."⁵² This is the approach taken by the Federal Rules of Evidence to these kinds of preliminary fact determinations. The Rules, like the Code, condition the admission of the proffered evidence upon proof of the preliminary facts by a sufficiency standard.⁵³

The personal knowledge requirement does not rest upon concepts of relevance, special or otherwise. Requiring lay witnesses to testify on the basis of first-hand knowledge has more to do with using the

48. See *supra* text accompanying note 15.

49. *Id.* But see Kaplan *supra* note 22 (arguing that, where disputed, the identity of the hearsay declarant should be governed by section 405 since jurors are unlikely to determine whether a party made the statement before considering the statement). For a description of the declarants in §§ 1224–1227, see MÉNDEZ, *supra* note 14, § 7.03.

50. CAL. EVID. CODE § 403 assembly committee on judiciary cmt.

51. *Id.* For a discussion of the foundational requirements for admitting co-conspirators' declarations, see MÉNDEZ, *supra* note 14, § 7.04. Federal requirements differ from those imposed by the Code. See *id.*

52. See the authorities listed in FED. R. EVID. 104 advisory committee's note.

53. See FED. R. EVID. 104(b).

most reliable sources of information than with relevance.⁵⁴ But even in this instance the use of a sufficiency standard is justified: jurors are as capable as judges in ascertaining whether a witness acquired his or her knowledge through the use of the senses.⁵⁵ Federal Rule of Evidence 602 takes a similar approach.⁵⁶

III. Preliminary Matters Governed by Section 405

Section 405 is designed to be a default provision. If a preliminary issue is not governed by section 403, it will be determined under section 405.⁵⁷ Despite the simplicity of this approach, uncertainty about the scope of section 403 led the drafters of the Code to list in their comment some of the preliminary fact issues governed by section 405. These include the following:

Competency of witnesses. Whether a witness is capable of expressing himself in a manner that can be understood or is capable of understanding the duty to tell the truth are matters to be resolved by the judge under section 405.⁵⁸ But, as has been noted,⁵⁹ whether a witness possesses the requisite personal knowledge is decided by the judge under section 403. Under Rule 104(a), the questions concerning the qualification of a person to be a witness are to be determined by the judge.⁶⁰

Qualification of experts. Whether a witness is qualified to provide the fact finder with an expert opinion is determined by the judge

54. MCCORMICK ON EVIDENCE, *supra* note 8, § 10.

55. The Federal Rules, like the Code, impose a sufficiency standard on the question of whether a witness is testifying on the basis of firsthand knowledge. *See* FED. R. EVID. 602.

56. FED. R. EVID. 602.

57. CAL. EVID. CODE § 405 (West 1995). A separate section, section 404, governs claims of privilege under the self-incrimination clause. *See id.* § 404. According to Professor John Kaplan,

A preliminary fact question that determines the admissibility of evidence is a Mabru [and should be decided under § 405] if and only if the judge must decide that question to uphold the policy of the rule that makes admissibility of the evidence turn on the preliminary question of fact to begin with. In other words, a preliminary fact question is a Mabru, and the judge must determine it, whenever we cannot trust the jury to apply the rule governing admissibility. All other such questions, where we can trust the jury, are Zorgs [and should be decided under § 403].

Kaplan, *supra* note 22, at 993. Examples of "mabrus" would include the rules excluding coerced confessions and confessions taken in violation of *Miranda*. *Id.* at 1007-1009. Authentication would be a "zorg."

58. *See* CAL. EVID. CODE § 701 law revision commission's cmt.

59. *See supra* text accompanying note 54.

60. FED. R. EVID. 104(a).

under section 405.⁶¹ Accordingly, the judge's determination that the witness is qualified is binding on the fact finder, but the fact finder may consider the witness's qualifications in deciding what weight, if any, to give to the opinion.⁶² Moreover, whether the expert's opinion is based on matters of a type reasonably relied upon by experts in the field or on scientific principles and techniques generally accepted by the pertinent scientific community are questions to be decided by the judge under section 405. The proponent must convince the judge by a preponderance of the evidence that expert evidence meets these tests.⁶³

Under Rule 104(a), whether a person qualifies as an expert is to be determined by the judge.⁶⁴

Section 405 also governs whether a witness is sufficiently acquainted with a person to give an opinion on that person's sanity⁶⁵ or with a person's handwriting to give an opinion on whether a writing is in that person's handwriting.⁶⁶ Since these questions relate to the qualifications of the witness, presumably they too would be determined by the judge in federal court under Rule 104(a).

Writings. Although authenticity is a section 403 issue, whether a writing is genuine must be determined by the judge under section 405 before admitting the writing for comparison with other writings whose authenticity is in dispute.⁶⁷ One would expect a similar role for a federal judge if the writing offered for comparison does not raise a conditional relevancy question. Rule 104(a), like section 405, is a default provision. It is generally applicable unless the preliminary question at issue is to be decided under the conditional relevancy provision of Rule 104(b).⁶⁸

Under the California Secondary Evidence Rule,⁶⁹ a party may prove the contents of a writing by offering the original writing or secondary evidence of the original.⁷⁰ The proponent, however, must offer the original if a genuine dispute exists concerning the material

61. CAL. EVID. CODE § 405 assembly committee on judiciary cmt.

62. *Id.* § 720 law revision commission's cmt.

63. See *People v. Brown*, 726 P.2d 516, 527 (Cal. 1985).

64. See FED. R. EVID. 104(a) and advisory committee's note.

65. See CAL. EVID. CODE § 405 assembly committee on judiciary cmt.

66. *Id.*

67. *Id.*

68. FED. R. EVID. 104(a)-(b) and advisory committee's note ("[Rule 104(a)] is of general application. It must, however, be read as subject to the special provisions for 'conditional relevancy' in subdivision (b) . . .").

69. CAL. EVID. CODE §§1521-1522.

70. *Id.*

terms of the original and justice requires its exclusion, or if admission of the secondary evidence would be unfair.⁷¹ Presumably, upon objection the proponent must convince the judge under section 405 either that no genuine dispute exists concerning the material terms of the original writing or that admission of the secondary evidence would not be unfair.⁷²

The Federal Rules of Evidence retain the traditional Best Evidence Rule. Proof of the contents of a writing must be made through the original writing unless nonproduction of the original writing is excused.⁷³ As in California, most questions regarding the satisfaction of the Rules' requirements are for the judge to decide under the standards of Rule 104(a).⁷⁴

Privileges. The party objecting on the grounds of privilege must establish the privileged nature of the matter under section 405.⁷⁵ Moreover, the party claiming an exception to the privilege must establish the preliminary facts under the same standard.⁷⁶ These rules are consistent with one of the goals of section 405: to withhold evidence from the fact finder because public policy requires its exclusion.

Unlike the Code, the Federal Rules do not contain provisions defining privileges. Congress rejected the Rules' article on privileges and substituted a provision that leaves the development of privileges in federal question cases to the common law as interpreted by the federal courts.⁷⁷ State privilege law applies only in those cases where state law supplies the rule of decision with respect to an element of a claim or defense.⁷⁸

The policy of withholding evidence from the fact finder because public policy justifies its exclusion also requires the objecting party to convince the judge under section 405 that admissions should be ex-

71. *Id.* § 1522.

72. This was the practice under the Best Evidence Rule. CAL. EVID. CODE § 405 assembly committee on judiciary cmt. For an extended discussion of the requirements of the Best Evidence and Secondary Evidence Rules, see Méndez, *supra* note 14 § 13.06.

73. FED. R. EVID. 1002.

74. FED. R. EVID. 1008 advisory committee's note.

75. CAL. EVID. CODE § 405 assembly committee on judiciary cmt. Most privileges for confidential communications create a presumption that the communications protected by these privileges were made in confidence. See MÉNDEZ, *supra* note 14, § 20.04.

76. CAL. EVID. CODE § 405 assembly committee on judiciary cmt.

77. FED. R. EVID. 501 and Federal Judicial Center's note. Professors Mueller and Kirkpatrick believe that the federal common law places upon the party opposing the privilege the burden of showing that an exception applies. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.12 (2d ed. 1999).

78. See Fed. R. Evid. 501 and advisory committee's note.

cluded because made in the course of compromise negotiations.⁷⁹ The same result should obtain in federal court under Rule 104(a).

Witness unavailability. The proponent of hearsay evidence of the type that is admissible only when the declarant is unavailable has the burden of persuading the judge of the declarant's unavailability as a witness under section 405.⁸⁰ If the opponent objects to the evidence on the ground that the proponent procured the declarant's unavailability to prevent the declarant from testifying, the opponent must establish that claim under section 405.⁸¹

The Rules and Advisory Committee Notes are silent on these points. Presumably, these questions are committed to the judge for resolution under the standards of Rule 104(a). However, neither this rule nor its accompanying note indicates which party should have the production and persuasion burdens. The federal approach to hearsay is that of the common law, that is, a general rule of exclusion with exceptions.⁸² Under this approach, the burden of proof on preliminary matters relating to admissibility is usually on the proponent.⁸³ Thus, upon objection the proponent of the evidence would have to persuade the judge of the declarant's unavailability. Because of the Rules' silence, resort to the federal common law is necessary to determine whether the opponent has the burden of proof on the question of whether the proponent procured the declarant's unavailability.

Hearsay evidence.

When hearsay evidence is offered, two preliminary fact questions may be raised. The first question relates to the authenticity of the proffered declaration—was the statement actually made by the person alleged to have made it? The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received—e.g., was the declaration spontaneous, the confession voluntary, the business record trustworthy? Under the Code, questions relating to authenticity of the proffered declaration are decided under Section 403. [O]ther preliminary fact questions are decided under Section 405.⁸⁴

Section 405, not section 403, thus governs whether a declaration, when made, was so far contrary to the declarant's interests that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true; whether a statement previ-

79. See CAL. EVID. CODE § 405 assembly committee on judiciary cmt.

80. See *id.*

81. See *id.*

82. See Fed. R. Evid., ART. VIII, HEARSAY advisory committee's introductory note.

83. See MUELLER & KIRKPATRICK, *supra* note 77 at § 1.12.

84. CAL. EVID. CODE § 405 assembly committee on judiciary cmt.

ously made by a witness is inconsistent with the witness's testimony and complies with the requirements of section 770; whether a statement previously made by a witness is consistent with the witness's testimony and complies with the requirements of section 791; whether a statement previously made by a witness qualifies as past recollection recorded; whether a statement previously made by a witness qualifies as a statement of prior identification; whether a declaration qualifies as an excited utterance, a contemporaneous statement, a dying declaration, or a declaration against interest; whether a declaration qualifies as a statement of a present or past mental state; whether certain writings meet the requirements for business and official records; and whether testimony given in another action qualifies as former testimony.

The use of section 405 to determine the existence of these kinds of preliminary facts is justified. Section 405 is designed in part to withhold evidence from the jury that is too unreliable for proper jury evaluation.⁸⁵ Hearsay is the classic example of untrustworthy evidence. The judge should not expose the jury to it unless the judge is satisfied that the circumstances justifying its admission as an exception have been demonstrated under the tough standards of section 405.

The language of Federal Rule of Evidence 104 and its accompanying advisory committee note would support a similar construction in the case of hearsay and its exceptions. To the extent that the relevance of the hearsay declaration depends on the existence of the preliminary fact in dispute, the question would call for the application of the sufficiency standard of Rule 104(b). Preliminary fact disputes relating to the circumstances justifying the hearsay exception would fall within Rule 104(a). This is not, however, the construction given to Rule 104 by the United States Supreme Court. In California, for example, the Code requires the prosecution to prove the foundational facts of the hearsay exception for co-conspirators's declarations by the sufficiency standard of section 403. The California approach is predicated on the theory that coconspirators's admissions are a form of authorized admissions, and the question of authority is governed by section 403.⁸⁶ But in *Bourjaily v. United States*,⁸⁷ the Court held that under the Federal Rules the proponent must establish the foundational facts of

85. *See id.*

86. *See id.* § 403 assembly committee on judiciary cmt.

87. 483 U.S. 171 (1986).

the coconspirators's hearsay exception by a preponderance of the evidence.⁸⁸

Reasonable people might differ on whether the foundational facts for this hearsay exception should be proved by a sufficiency or higher standard.⁸⁹ The point, however, is that the United States Supreme Court did not feel constrained by the Rules in selecting the more likely than not standard. Neither the language of Rule 104(a) nor its accompanying note specifies the applicable standard as clearly as do section 403 and its accompanying comment.

IV. The Burden of Proof in Section 405 Determinations

Section 405 does not prescribe the burden of proof that applies to the determination of the preliminary facts governed by the section. Instead, section 405 directs the judge to "the rule of law" under which the issue arises when allocating the burden of producing evidence and determining the burden of persuasion.⁹⁰

Confessions provide a good example of how section 405 works. At one time, the California courts required the prosecution to prove beyond a reasonable doubt that the accused had properly waived his *Miranda* rights or had confessed voluntarily.⁹¹ Accordingly, the "rule of law" under which the issue arose required the prosecution to meet this standard if the accused challenged a confession on *Miranda* or involuntariness grounds.

The standard of proof changed with the advent of Proposition 8's Right to Truth-in-Evidence provision. This provision gives parties to criminal proceedings the state constitutional right not to have relevant evidence excluded.⁹² Since a confession is legally relevant irrespective of whether it was taken in compliance with *Miranda* or given

88. See *id.* at 175.

89. See generally Kaplan, *supra* note 22, at 997 (arguing that the foundational facts of the hearsay exception for co-conspirators' statements should be governed by section 405 since jurors are unlikely to engage in the required fact finding before considering the statement).

90. See CAL. EVID. CODE § 405.

91. See generally, *People v. Stroud*, 78 Cal. Rptr. 270, 275 (Ct. App. 1969) (holding that prosecution must prove compliance with *Miranda* beyond a reasonable doubt); *People v. Jimenez*, 580 P. 2d 672, 678 (Cal. 1978) (holding that prosecution must prove voluntariness beyond a reasonable doubt).

92. See CAL. CONST. art. I, § 28(d). For an extended discussion of the Right to Truth-in-Evidence provision of Proposition 8, see MENDOZ, *supra* note 14, § 15.03.

involuntarily, Proposition 8 overturned the cases requiring the preliminary facts to be proven beyond a reasonable doubt.⁹³

Proposition 8, of course, cannot diminish federal Constitutional rights. Today, the admissibility of evidence over a federal Constitutional objection is determined by the standards the United States Supreme Court laid down in *Lego v. Twomey*.⁹⁴ In that case, the Court held that the accused is entitled to a "clear-cut determination" that his constitutional rights have been observed.⁹⁵ That demand can be met only by requiring the prosecution to prove compliance with the Constitutional standards by at least a preponderance of the evidence.⁹⁶

Proposition 8 also changed the burden of persuasion that applies when the accused challenges the legality of a pretrial identification. Prior to the initiative, the courts required the prosecution to prove by clear and convincing evidence that the in-court identification was free from the taint of any illegal pretrial identification.⁹⁷ Since federal standards now govern this question, the prosecution need prove only by a preponderance of the evidence that federal constitutional identification requirements were observed.⁹⁸

The "rule of law" applicable to a given preliminary fact dispute governed by section 405 may be silent with respect to the burdens of producing evidence and of persuasion. In such a circumstance, the Code provides two default positions on these questions. Section 115 provides that, unless otherwise provided by law, the burden of persuasion requires "proof by a preponderance of the evidence."⁹⁹ Section 550 in turn places the burden of producing evidence on a particular issue on the party with the burden of persuasion on that issue.¹⁰⁰ As a rule, then, unless the applicable rule of law states otherwise, the proponent must come forward with evidence that convinces the judge by

93. See generally *People v. Kelly*, 800 P.2d 516, 542 n. 1 (Cal. 1990) (Mosk, J., concurring) (holding that compliance with *Miranda* need be shown merely by a preponderance of the evidence); see also *People v. Markham*, 775 P.2d 1042, 1047 (Cal. 1989) (holding that voluntariness need be shown merely by a preponderance of the evidence).

94. 404 U.S. 477 (1972).

95. See *id.* at 483.

96. See *id.* at 484; see also *Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (waiver of *Miranda* rights); *United States v. Matlock*, 415 U.S. 164, 177 (1974) (suppression motions raising Fourth Amendment questions). For a discussion of whether proof beyond a reasonable doubt should apply in determining the admissibility of confessions, dying declarations, and some declarations against interest, see Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

97. See *People v. Martin*, 471 P.2d 29, 37 (Cal. 1970).

98. See *Lego v. Twomey*, 404 U.S. 477.

99. CAL. EVID. CODE § 115 (West 1995).

100. See *id.* § 550(b).

a preponderance of the evidence of the existence or nonexistence of the preliminary facts governed by section 405.

The Rules do not contain similar default provisions with respect to the allocation of the production and persuasion burdens governing preliminary fact determinations under Rule 104(a).¹⁰¹ In the case of hearsay, however, the Rules place upon the objecting party the burden of persuading the judge that the proffered evidence is assertive and therefore hearsay.¹⁰² Despite claims to the contrary, placing the burden of persuasion on the opponent is achieved by directive of the of Advisory Committee in its note and not by the language of Rule 801(a). The Code is silent on this point. Presumably, in California the proponent would have the burden of persuading the judge that the evidence is not assertive.¹⁰³

V. The Rules of Evidence and Determinations Under Sections 403 and 405

The rules of evidence apply to hearings on the admissibility of evidence under sections 403 and 405. The California Law Revision Commission recommended that the rules not apply to determinations made under section 405.¹⁰⁴ That position, however, was rejected by the California Legislature.¹⁰⁵

The Commission was concerned that applying the rules could result in the exclusion of reliable hearsay statements:

For example, if witness *W* hears *X* shout, "Help! I'm falling down the stairs!", the statement is admissible only if the judge finds that

101. Professors Mueller and Kirkpatrick maintain that these burdens are generally on the proponent in federal court:

Apart from tradition and ease in application, there seem to be three reasons for this allocation. First, usually the offering party is best situated to explain and justify the evidence it chooses to present and can best aid the court in applying the rule in question. Second, the standard allocation is simply an outgrowth or particular application of the broader idea that a party who asks a court to do anything usually bears the burden of explaining and justifying the request. Third, this allocation is an aspect of the adversary system in which parties gather and present evidence, and part of the necessary burden is explaining and justifying consideration of the evidence.

MUELLER & KIRKPATRICK *supra* note 77, § 1.12.

102. See FED. R. EVID. 801 advisory committee's note.

103. See Miguel A. Méndez, *I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. REV. 351, 353 text accompanying n.9 (2003) (submitted to the California Law Revision Commission in 2002).

104. Cal. Law Revision Comm'n, REPORTS, RECOMMENDATIONS, AND STUDIES 19 (1964).

105. See FED. R. EVID. 104(a) advisory committee's note; and the wording in CAL. EVID. CODE § 405 (West 1995).

X actually was falling down the stairs while the statement was being made. If the only evidence that he was falling down the stairs is the statement itself, or the statements of bystanders who no longer can be identified, the statement must be excluded. Although the statement is admissible as a substantive matter under the hearsay rule, it must be held inadmissible if the formal rules of evidence are rigidly applied during the judge's preliminary inquiry.¹⁰⁶

In the Commission's view, the rules of evidence were developed largely to protect jurors untrained in the law from weak and unreliable evidence.¹⁰⁷ Judges need no such protection. The Legislature, however, refused to enact the rule recommended by the Commission. The drafters of the Federal Rules of Evidence adopted the position espoused by the Commission and others. The Rules provide that in determining preliminary questions concerning the admissibility of evidence, the judge "is not bound by the rules of evidence except those with respect to privileges."¹⁰⁸ The federal approach allows the judge to consider a hearsay declaration as proof of the foundational elements of a hearsay exception. But whether the declaration alone should suffice as proof of the foundational facts has been controversial. In 1997 Congress amended Rule 801(d)(2) to provide that

the contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and participation therein of the declarant and the party against whom the statement is offered under subdivision (E).¹⁰⁹

These subdivisions refer to the hearsay exemptions for authorized admissions, admissions by agents and servants, and coconspirators' admissions.¹¹⁰ A Commission recommendation allowing California judges to consider inadmissible evidence in making section 405 determinations should take into account the Rules' limitations on the sufficiency of such evidence as proof of preliminary facts.

VI. Conditional Admissibility

Sometimes the relevance of an item of evidence depends upon the proof of other facts. For example, in an action for breach of a written contract, the relevance of a contract tendered by the plaintiff

106. 6 Cal. Law Revision Comm'n, REPORTS, RECOMMENDATIONS, AND STUDIES 20 (1964).

107. *Id.*

108. FED. R. EVID. 104(a).

109. *Id.* 801(d)(2).

110. *Id.*

will depend on whether it was the contract entered into by the defendant. If the contract was signed by someone other than the defendant, then the relevance of the contract will depend on whether the person signing was authorized to do so by the defendant.¹¹¹ Absent evidence that the defendant entered into the contract or that it was signed by an agent authorized to do so, the contract would be irrelevant. It would be wholly unconnected with the defendant and, therefore, immaterial.

In California, section 403 of the Evidence Code places upon the proponent of such evidence (the plaintiff in our example) the burden of producing evidence of facts connecting the contract with the defendant.¹¹² Against the objection of the opposing party, the proponent of the proffered evidence must usually produce the evidence of the preliminary facts (the connecting evidence) before the proffered evidence (the contract) can be received in evidence.¹¹³ However, the trial judge may admit the proffered evidence on the condition that the proponent supply the evidence of the preliminary or connecting facts before the close of the evidence.¹¹⁴

If the proffered evidence is received, the judge may, and upon request of the opposing party, must instruct the jury to disregard the proffered evidence unless the jury first finds the preliminary facts.¹¹⁵ The instruction insures that the judge's conclusion about the existence of the preliminary fact(s) will not deprive the opponent of a jury determination of the issue.

The Rules also permit the judge to receive evidence on a conditional basis.¹¹⁶ Like section 403, the Federal Rules impose a sufficiency test. Upon the opponent's motion, the judge must strike the evidence unless the proponent introduces "evidence sufficient to support a finding of the fulfillment of the condition."¹¹⁷ The major difference between the Rules and the Code is that the Rules do not contain a provision regarding the limiting instruction. Giving such an instruc-

111. See *Brown v. Spencer*, 126 P. 493 (Cal. 1912).

112. See CAL. EVID. CODE § 403(a).

113. See *id.*

114. *Id.* § 403(b). No such discretion exists when the opposing party objects to evidence on the ground that the witness does not possess the requisite personal knowledge. Against such an objection, the proponent must show that the witness possesses the required personal knowledge before the witness may continue with his testimony. *Id.* § 702. Accord FED. R. EVID. 602.

115. CAL. EVID. CODE § 403(c)(1).

116. FED. R. EVID. 104(b).

117. *Id.* For a discussion of the special meaning given to the term "conditional relevance" under the Federal Rules, see *supra* text accompanying note 52.

tion is the product of federal trial practice. California should retain the provision of section 403 governing limiting instructions.

VII. Preliminary Fact Determinations Involving Ultimate Issues

Section 405 allows judges to withhold evidence from the jury based on two determinations: first, the judges' resolution of evidentiary conflicts regarding preliminary facts, and second, on their assessment of the credibility of the witnesses called to prove or disprove the preliminary facts.¹¹⁸ The judges' broad powers to pass on preliminary fact questions governed by section 405 are justified by the purposes of the section. Section 405 is "designed to withhold evidence from the jury because it is too unreliable or because public policy requires its exclusion."¹¹⁹

These broad powers can sometimes threaten a party's right to jury determinations of factual issues whenever the preliminary fact issue is also an issue involved in the merits of the case. In a contract action, for example, one of the issues may be the existence of the contract. The defendant's position might be that the signature on the contract is not his. Whether or not the signature on the contract is the defendant's calls for a section 403 determination.¹²⁰ The judge's role in deciding the question will not threaten the parties' right to a jury decision on the issue because section 403 requires the judge to apply a sufficiency standard in ruling on the admissibility of the contract.¹²¹

Suppose, however, that the plaintiff offers into evidence, not the original contract, but a copy authenticated as a true copy of the original on the theory that the original was lost through no fault of the plaintiff. Under the Secondary Evidence Rule, the plaintiff may offer a copy, unless the defendant disputes the existence of the original.¹²² Whether the original was lost, as claimed by the plaintiff, or never existed, as claimed by the defendant, is governed by section 405. A ruling in favor of the plaintiff could imply a finding of the existence of the contract. To avoid contaminating the jurors with his ruling, the Code prohibits the judge from informing them about the basis of his or her ruling.¹²³

118. See *supra* text accompanying note 99.

119. CAL. EVID. CODE § 405 assembly committee on judiciary cmt.

120. See *supra* text accompanying note 40.

121. *Id.*

122. See Cal. Evid. Code §§ 1520-1521.

123. See *id.* § 405(b)(1).

A ruling in favor of the defendant, however, would result in a verdict in the defendant's favor without the existence or nonexistence of the contract ever getting to the jury. Accordingly, the Federal Rules provide that

when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.¹²⁴

The California Secondary Evidence Rule empowers judges to exclude secondary evidence of the content of a writing if the judge concludes that a genuine dispute exists concerning the material terms of the writing and justice requires its exclusion.¹²⁵ Since exclusion of secondary evidence could result in a directed verdict in favor of the objecting party whenever a disputed material term is dispositive, consideration should be given to adopting the federal approach.¹²⁶

California judges have discretion to hold hearings on the admissibility of evidence out of the presence or hearing of the jury.¹²⁷ But challenges to the admissibility of confessions and admissions in criminal cases must be held out of the jury's presence if requested by any party.¹²⁸ The purpose is to avoid prejudicing the accused in the event the confession or admission is excluded. The Federal Rules go farther. The presence of the jurors does not depend on a request by a party. Hearings on the admissibility of confessions in all cases must be conducted out of the hearing of the jury.¹²⁹

Holding hearings out of the presence of the jury can result in the duplication of evidence. For instance, consider a confession which the accused claims was coerced. If the judge rules against the accused at the section 402 hearing¹³⁰ and admits the confession, the accused is still entitled to urge the jury to give little or no weight to the confes-

124. FED. R. EVID. 1008.

125. CAL. EVID. CODE § 1521.

126. See Kaplan, *supra* note 22, at 996 (pointing out that, under California's old best evidence rule, the Code failed to confer upon California jurors the powers given by Rule 1008 to federal jurors).

127. See Fed. R. Evid. 104(c); see also CAL. EVID. CODE § 402(b).

128. See CAL. EVID. CODE § 402(b). No request is necessary under the Federal Rules. See FED. R. EVID. 104(c).

129. FED. R. EVID. 104(c).

130. Hearings on the admissibility of evidence under sections 403 and 405 are sometimes denominated "402 hearings" because it is section 402 which authorizes the use of hearings on admissibility to take place out of the presence of the jury. See CAL. EVID. CODE § 402.

sion because it was coerced.¹³¹ To make that argument in summation, the accused must be given an opportunity to produce the evidence of coercion before the jury.¹³² The parties will have to reproduce before the jury much of the evidence they produced before the judge.

VIII. Limiting Instructions and Section 403 Determinations

If the judge admits the proffered evidence under section 403, the judge "may, and on request shall, instruct the jury . . . to disregard the proffered evidence unless the jury" first finds the existence of the preliminary fact.¹³³ Section 403, however, is silent on two important questions: (1) must all the jurors agree on the existence or nonexistence of the preliminary fact? and, (2) by what standard must the jurors find the existence or nonexistence of the preliminary fact?

Since jury unanimity is not required in California civil cases,¹³⁴ presumably jury unanimity is not required in finding preliminary facts in civil matters. The same number needed to return a verdict should suffice in the finding of preliminary facts. And since jurors can return verdicts based on the preponderance of the evidence in most civil proceedings,¹³⁵ presumably that standard applies in those proceedings at least with respect to preliminary facts that are also elements of the claim or defense.

In California, jury unanimity is required in criminal cases.¹³⁶ It follows, then, that jury unanimity should also be required in finding preliminary facts that constitute elements of the offense charged. In California, as elsewhere, jurors can return a guilty verdict only if they find the accused guilty beyond a reasonable doubt.¹³⁷ Presumably, that standard applies to preliminary facts that are also elements of the offense. But the standard may apply to other preliminary facts as well. At least where circumstantial evidence has been received, jurors are told that,

each fact which is essential to complete a set of circumstances necessary to establish . . . guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable

131. See CAL. EVID. CODE § 406.

132. See *id.*

133. *Id.* § 403(c)(1).

134. See CAL. CONST. art. I § 16.

135. See CAL. EVID. CODE § 115.

136. See CAL. CONST. art I, § 16.

137. CAL. PENAL CODE § 1096 (West 1985).

doubt, each fact or circumstance on which such inference necessarily rests must be proved beyond a reasonable doubt.¹³⁸

The Federal Rules contain no provisions on limiting instructions.¹³⁹ Section 403(c) should be retained even though it is silent with respect to the standard of proof required for finding preliminary facts and the number of jurors required to find those facts.

IX. Other Provisions Relating to Admissibility

Under the Code, questions of law, including questions concerning the admissibility of evidence and other rules of evidence, are for the court to decide.¹⁴⁰ Federal Rule of Evidence 104(a) provides that questions relating to the admissibility of evidence are to be determined by the court.¹⁴¹ Under the Code, questions of fact are to be decided by the jury, including the effect and value of the evidence

138. CAL. JURY INSTRUCTIONS, CRIMINAL 2.01 (6th ed. 1996) ("CALJIC"). But some California cases suggest that facts found and used by jurors in a chain of reasoning leading to a guilty verdict can be found by a preponderance of the evidence. For example, California jurors are routinely told to disregard evidence of uncharged misdeeds unless they first find by a preponderance of the evidence that the misdeed was committed. See CALJIC § 2.50.1 (2002 revision). In its note, the Committee on Standard Jury Instructions, Criminal, acknowledges a conceivable conflict between 2.01 and 2.50.1. *Id.* Other cases hold that in screening the evidence under section 403, a judge should withhold the evidence from the jury unless the judge finds that a reasonable jury could find the preliminary fact in issue by a preponderance of the evidence. Under this standard a judge would withhold a co-conspirator's declaration from the jury unless the proponent proffers "sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence." *People v. Herrera*, 98 Cal. Rptr. 2d 911, 922 (Ct. App. 2000). This is the sufficiency test which federal judges must employ. See *Huddleston v. United States*, 485 U.S. 681, 687 (1988).

The addition of the "more likely than not" standard probably adds little to the traditional sufficiency test since the test is still heavily tilted in favor of admissibility. For purposes of admissibility, the question for the California trial judge under Proposition 8 would appear to be whether a reasonable juror could find that a conspiracy existed if the proponent's evidence is believed. Subject to certain exceptions, Proposition 8 requires the admission of relevant evidence as a matter of constitutional right in California criminal cases. See CAL. CONST. art I § 28. Whether jurors should be instructed to disregard the evidence *after* it has been admitted unless they find the conspiracy or other preliminary fact by some higher standard is a separate question.

139. Like the Code, the Rules do contain a provision concerning the limited admissibility of evidence. See FED. R. EVID. 105; CAL. EVID. CODE § 355 ("When evidence is admissible as to one party or for one purpose but not admissible as to another party or for another purpose, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). For the comparable Code provision, see CAL. EVID. CODE § 355.

140. See Cal. Evid. Code § 310.

141. See FED. R. EVID. 104(a).

addressed to it and the credibility of witnesses and hearsay declarants.¹⁴² The Rules do not have an analogous provision.

Under the Code, a person claiming the federal or state self-incrimination privilege "has the burden of showing that the proffered evidence might tend to incriminate him" or her.¹⁴³ Further, "the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege."¹⁴⁴ The Rules do not have an equivalent provision. Presumably, in federal court the privilege claimant would rely on federal cases defining the witness privilege under the Fifth Amendment Self-Incrimination Clause.

Under the Code and the Rules, judges have discretion to determine whether hearings on preliminary fact questions should be conducted out of the presence or hearing of the jury.¹⁴⁵ But the Rules mandate all hearings on the admissibility of confessions to be held outside the hearing of the jury.¹⁴⁶ The Code requires such a hearing only upon request by a party.¹⁴⁷

The Rules provide that the "accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case."¹⁴⁸ The Code is silent on this point.

Both the Code and the Rules specify that the provisions governing preliminary fact questions do not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.¹⁴⁹ As has been noted, the admission of proffered evidence often requires the parties at trial to offer much of the same evidence received at the admissibility hearing in order to afford the jurors a basis for determining the weight to be given to the evidence.¹⁵⁰

X. Summary of Major Differences Between the Code and the Rules

Both the Code and Rules acknowledge that judges should exercise different screening powers in determining the admissibility of evidence. To preserve the jury's fact finding function, both require

142. See CAL. EVID. CODE § 312.

143. See *id.* § 404.

144. *Id.* § 404.

145. FED. R. EVID. 104(c); CAL. EVID. CODE § 402(b).

146. See FED. R. EVID. 104(c).

147. See CAL. EVID. CODE § 402(b).

148. FED. R. EVID. 104(d).

149. See FED. R. EVID. 104(e); CAL. EVID. CODE § 406.

150. See *supra* text accompanying note 130.

judges to use a sufficiency standard in determining the admissibility of certain kinds of evidence. By specifying the kinds of preliminary fact disputes subject to this standard, section 403 provides judges and parties greater guidance than does the conditional relevance approach of Rule 104(b).

To assure the exclusion of evidence disfavored by the rules, both the Code and the Rules give judges greater screening powers. The Code achieves this goal by making section 405 a default provision. If the preliminary fact dispute is not governed by section 403, it falls within the ambit of section 405. If the rule of law governing the section 405 dispute does not specify the burden of proof, other Code default provisions require the proponent to come forward with proof that convinces the judge by a preponderance of the evidence of the existence or nonexistence of the disputed preliminary fact.¹⁵¹

Rule 104(a) is also a default provision. In determining the admissibility of evidence, the federal judge is to exercise the powers conferred by this subdivision unless the preliminary fact question is governed by Rule 104(b)'s conditional relevancy provision. While section 405 does not attempt to specify the kinds of preliminary fact questions falling within the section, Rule 104(a) expressly provides that preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence are to be determined under subdivision (a) unless the question is governed by Rule 104(b).

The Code makes up for the lack of specificity in section 405 by extensive discussion in the comments to sections 403 and 405 about the kinds of preliminary facts falling within each section. The detailed comments provide judges and parties with greater guidance than Rule 104 and its accompanying note. Although reasonable people can differ about whether the foundational facts for some hearsay exceptions should be proved only by a sufficiency standard or by a higher standard, in their comments the drafters of the Code make clear their election to treat some of these facts as raising only a sufficiency issue.¹⁵²

The Rules do not specify which burden of persuasion applies when the preliminary fact question is not governed by the sufficiency standard. The United States Supreme Court, however, has "tradition-

151. See *supra* text accompanying note 99.

152. See CAL. EVID. CODE §§ 403, 405 assembly committee on the judiciary cmt.

ally required that these matters be established by a preponderance of proof."¹⁵³

The Code and the Rules are at odds with respect to the kind of evidence that can be received to prove the existence or nonexistence of preliminary facts when the judge is asked to make the admissibility determinations contemplated by section 405 and Rule 104(a). Under the Rules, the judge "is not bound by the rules of evidence except those with respect to privileges."¹⁵⁴ Under the Code, the rules of evidence apply.¹⁵⁵

The Code contains a provision regarding limiting instructions when jurors are asked to re-determine the existence of preliminary facts.¹⁵⁶ The Rules do not have an equivalent provision.¹⁵⁷

Finally, the Rules provide that in the case of some Best Evidence Rule objections, the judge must allow the disputed preliminary fact to go to the jury under a sufficiency standard when the issue is also a question in the merits of the case.¹⁵⁸ The related California provision does not go this far with respect to similar questions raised under California's Secondary Evidence Rule.¹⁵⁹

153. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

154. FED. R. EVID. 104(a).

155. *See supra* text accompanying note 103.

156. *See supra* text accompanying note 113.

157. *See supra* text accompanying notes 113, 114.

158. *See supra* text accompanying note 122.

159. *See supra* text accompanying note 123.